NO. 45389-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CLIFFORD PAYSENO,

Appellant.

v.

KITSAP COUNTY,

Respondent,

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-2-01585-6

BRIEF OF RESPONDENT

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	Thomas E. Weaver P.O. Box 1056 Bremerton, WA 98337-0221 **Email: weaver@tomweaverlaw.com**	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 9, 2014, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly denied Payseno's petition to reinstate his firearms rights where he had not been crime-free in the community for the preceding five years?

II. STATEMENT OF THE CASE

Clifford Payseno was convicted Kitsap County Superior Court of as VUCSA felony offense in 2000. CP 2. He was subsequently was convicted of misdemeanor offenses in 2000, 2007, and 2010 in Kitsap County District Court, Ocean Shores Municipal Court, and Lakewood Municipal Court, respectively. CP 2.

In 2013, Payseno filed a petition to have his firearms rights restored pursuant to RCW 9.41.040(4). CP 1. The parties did not contest the facts. CP 17. The only question presented was whether the requirement that he have been crime-free in the community was satisfied by the period of law-abiding behavior between 2000and 2007, or whether he had to have been crime-free in the five years preceding the filing of the petition. CP 30.

After considering the arguments of the parties, the trial court concluded that the latter interpretation of the statute was correct. CP 31. It therefore denied the petition. *Id.*

III. ARGUMENT

THE TRIAL COURT PROPERLY DENIED PAYSENO'S PETITION TO REINSTATE HIS FIREARMS RIGHTS WHERE HE HAD NOT BEEN CRIME-FREE IN THE COMMUNITY FOR THE PRECEDING FIVE YEARS.

RCW 9.41.040 allows a party to petition for restoration of his or her firearm rights after spending five years, and only after, spending five years in the community crime free. Payseno is not seeking restoration of his firearm rights "after" five consecutive years in the community without any law violations. He is seeking restoration of his firearm rights after only three years of crime free behavior. Admittedly, he completed five crime-free years prior to his offense three years before he filed his petition. However, the language of the statute should not be read to permit restoration of rights after five and/or three crime-free years.

As indicated in Payseno's brief, this is an issue of statutory interpretation. The parties agree to the facts of the case and Payseno's criminal history. The State believes that the statute should be read to require that Payseno have been in the community crime-free since his last conviction, rather than from any conviction. The State reaches this conclusion by first looking at the plain language of the statute and the other conditions on the statute that clearly prioritize the status of Payseno at the time the petition is made. This Court should also consider the legislative intent of the statute that emphasizes public safety, and only

provides for rights restoration after a showing of rehabilitation. Finally, the Court should consider the potentially absurd results flowing from Payseno's interpretation of the statute.

The relevant statutory language is set forth at RCW 9.41.040(4)(a):

> [T]he individual may petition a court of record to have his or her right to possess a firearm restored:
>
> * * *
>
> (ii)(A) If the conviction ... was for a felony offense, *after five or more consecutive years in the community without being convicted ... or currently charged with any felony, gross misdemeanor, or misdemeanor crimes*, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525.

(Emphasis added).

1. The plain language of the statute supports the conclusion below.

In construing a statute, this Court's primary objective is to ascertain and give effect to the intent of the Legislature. *Cherry v. Metro Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991). If a statute is unambiguous this Court is required to apply the statute as written and "'assume that the legislature means exactly what it says.'" *In re Smith*, 137 Wn.2d 1, 9, 969 P.2d 21 (1998) (*quoting State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995)). The rule of lenity provides that if a criminal statute is ambiguous, it is to be interpreted in favor of the defendant. *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996). If a

statute is unambiguous, however, the rule of lenity is inapplicable. *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993); *Chapman v. United States*, 500 U.S. 453, 463-64, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991). Moreover, "[a] statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable." Berger, 144 Wn.2d 91, 105, 26 P.3d 257 (2001).

Both sides would agree that Payseno is petitioning for firearm restoration after three consecutive years in the community without being convicted of a crime. That is an undeniable fact. However, the statute says nothing about being able to petition after only three years of crime-free behavior. If a petitioner goes five years crime free, followed by three years crime free, he is not eligible to petition under the statute because he is petitioning after a time period that was shorter than five years.

The statute provides that an "individual may petition ...to have his or her right to possess a firearm restored ... after five or more consecutive years in the community without being convicted [of a crime]." RCW 9.41.040(4)(a). This language clearly provides that a defendant may not petition the court for restoration after only three years without a criminal conviction. However, this is exactly what Payseno attempted to do. His interpretation would permit defendants to petition the court after three

crime-free years in the community, provided they completed five years at some other point.

In order to petition, a defendant must follow his last conviction with a five-year crime-free period in order to re-open the window for petitioning. That is the only reading of the statute that would allow people to petition after five years, and only after five years, crime-free in the community. Payseno's proposal is not a logical reading of the statute because it allows petitions to occur after less than five years crime free. Therefore, the rule of lenity should not be applicable, as there is only one reasonable reading of the plain language of the statute.

2. Payseno's interpretation defies the legislative intent and sound public policy.

Even were the statute ambiguous, the clear legislative intent does not support Payseno's interpretation. In the 1994 amendments to the statute, the Washington legislature found that "increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions." Laws of 1994, 1st Spec. Sess., ch. 7, § 101. The legislature also found "violence is abhorrent to the aims of a free society and that it cannot be tolerated." *Id.* Accordingly, the legislature focused its efforts toward, among other things, "reducing the unlawful use of and access to firearms." *Id.*

RCW Chapter 9.41 was again amended in 1995, as part of the Hard

Time for Armed Crime Act. Laws of 1995, ch. 129, § 1. The people found that the "[c]urrent law [did] not sufficiently stigmatize the carrying and use of deadly weapons by criminals." *Id.* Accordingly, the citizens of Washington sought to increase the penalties for criminal possession and use of firearms and close loopholes in the law. *Id.* These intentions were manifested by "[s]tigmatiz[ing] the carrying and use of any deadly weapons for all felonies." *Id.* Further evidence of legislative intent can be found in the final bill report:

> In some cases, after five years in the community without a conviction or current charge for any crime, a person whose right to possess a firearm has been lost because of a criminal conviction may petition a court of record for restoration of the right. However, the person must also have passed the "washout" period under the Sentencing Reform Act before he or she may petition the court. Effectively, this means that a person with a conviction for a class A felony or any sex offense can never seek restoration of the right. Generally, in the case of a class B felony the washout period is 10 years, and in the case of a class C felony it is five years.

Final Bill Rep. on S.H.B. 2420, 54th Leg. Reg. Sess. at 2 (Wash.1996).

This language shows that the Legislature (l) sought to keep guns out of the hands of criminals, (2) was more concerned about the recent criminal history rather than distant criminal history, and (3) wanted more serious offenders to wait longer to have their rights restored. This is the basis for including the washout language in the statute. By preventing washed-out convictions from prohibiting restoration, the Legislature

recognized that older criminal history was not necessarily the best indicator of the current dangerousness of an individual. It also recognized that people convicted of class A and B felonies would need to wait longer than 5 years.

The legislature also recognized that there needs to be a mechanism for people to have their firearm rights restored. The primary requirement was that Payseno had to be rehabilitated. That focus can be found in RCW 9.41.040(3) of the restoration statute:

> A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Each of these delineated procedures require a showing of rehabilitation.

For example, in *State v. Radan*, 143 Wn.2d 323, 21 P.3d 255 (2001), the defendant was convicted of a felony in Montana. He thereafter received an "early discharge" from the Montana court. The issue was whether this "early discharge" qualified under RCW 9.41.040(3) as an equivalent finding of rehabilitation. The Washington Supreme Court found that it did qualify, emphasizing that it did because the Montana discharge included a finding of rehabilitation:

> [I]mportant is the fact that the statute authorizing Radan's early discharge requires a finding that a conditional

> discharge from supervision is in the best interests of the probationer and society and "will not present unreasonable risk of danger to the victim of the offense." Mont. Crim. Code § 46-23-1011. While we decline to establish a precise definition for the phrase "finding of rehabilitation," we believe that for purposes of RCW 9.41.040 the finding in Radan's case is equivalent to an "other equivalent procedure" based upon a "finding of rehabilitation." *See United States v. Pagan*, 721 F.2d 24, 30 (2d Cir. 1983).

Radan, 143 Wn.2d at 335. In his dissent, Justice Talmadge would take the need for a showing of rehabilitation even further. He asserted that in enacting RCW 9.41.040(3), the "Legislature plainly intended an individualized assessment by an executive branch agency or judicial officer that the felon was ... found to be rehabilitated before that felon's ability to possess firearms could be restored." *Radan*, 143 Wn.2d at 336 (Talmadge, J., dissenting). The dissent went on to say that "public safety requires no less." Strong evidence of rehabilitation is recent criminal history, or lack thereof. Payseno's recent history indicates he committed a crime within the five years preceding his restoration petition. While it is commendable that he went from 2000 to 2007 without any criminal convictions, his more recent history contradicts a finding that he was rehabilitated. It would be unlikely that the Legislature would have considered someone with recent criminal history to be rehabilitated just because they went five years crime-free at some other time in his past.

Payseno essentially argues that the Legislature has little interest in what a petitioner has done for the last five years. As long as they

completed a crime free-period at some earlier date, they are free to commit any number of crimes and still get their gun rights back. Given the purpose of the legislation to increase public safety and rehabilitation, this seems highly unlikely.

3. Payseno's recent conviction supports the decision below.

Given the Legislature's focus on rehabilitation, it's not surprising that this statute has been interpreted in other instances to consider the status of the petitioner at the time the petition was filed, rather than at earlier times. Particularly subject to litigation has been the provision that the petitioner have had "no prior felony convictions that prohibit possession of a firearm." RCW 9.41.040(4)(a).

This language has been argued in two ways: that the petitioner have (1) no prior felony convictions before the disqualifying offense and (2) no prior felony convictions before petitioning for restoration. In *Graham v. State*, 116 Wn. App.185 189, 64 P.3d 684 (2003), and *State v. Hunter*, 147 Wn. App. 177, 185, 195 P.3d 556 (2008), *reversed on other grounds*, 173 Wn.2d 199, 265 P.3d 890 (2011),[1] both cases held that the relevant date was the date the defendant petitions for restoration and not the date of the disqualifying defense. *Graham*, 116 Wn. App. at 190;

[1] Notably, *Hunter* was reversed because the Supreme Court found there was "a procedure equivalent to a certificate of rehabilitation," as in *Radan*. *State v. RPH*, 173 Wn.2d 199, 204, 265 P.3d 890 (2011) (*citing* RCW 9.41.040(3).

Hunter, 147 Wn. App. at 185. As explained in *Graham*:

> [T]he statutory language, coupled with the legislature's express intent, leads us to conclude that "previous conviction"... means any conviction prior to the time of the petition, not a conviction prior to the one that disabled the petitioner's firearm rights. Such a construction is consistent with statutory intent of stigmatizing the use and possession of firearms and discouraging criminals from possessing and using firearms to commit crimes.

Graham, 116 Wn. App. at 190; *Hunter*, 147 Wn. App. at 185. While these cases do not directly address when the five year crime free period must occur, its reasoning is persuasive for the proposition that the legislature and court were concerned about the recent criminal activity of a petitioner, rather than older history.

That is the primary purpose of including the "washout" language in the statute. It simply prevents older criminal history from disqualifying a petitioner who has been rehabilitated and now seeks restoration of rights. In *State v. Mihali*, 152 Wn. App. 879, 218 P.3d 922 (2009), this Court similarly analyzed the "prior" language, but added an interpretation of the sentence at issue in the present case:

> Reading this provision as a whole, it is plain that the legislature intended for the court to look at the petitioner's status at the time she filed her petition. First, the legislature begins the relevant portion of this statute with the phrase "after five or more years in the community," clearly requiring that at least five crime-free years lapse before a felon may petition. Second. in the same sentence, the statute contains this dependent clause: "if the individual has no prior felony convictions." Reading these provisions together can only mean that after five crime-free years, and

> if the person has no "prior" felony convictions, she may petition. This latter dependent clause is further limited to those prior convictions "that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525." Finally, the legislature's use of the word "prohibit" in the present tense in this clause clearly refers to Payseno's criminal history at the time one files the petition

This holding further shows that it is the current status of petitioner that matters, and thus, to be eligible for restoration he must have been crime-free in the five years prior to the petition.

Additionally, a petitioner is not eligible for restoration if "currently charged with any felony, gross misdemeanor, or misdemeanor crimes." RCW 9.41.040(4)(a). The Legislature's reference to "current" charges in the same sentence that it referred to "five or more consecutive years" is indicative of an intent to have the court consider the recent crime-free period, rather than any crime-free period that occurred earlier. More importantly, the Legislature was clearly concerned about whether a petitioner was currently charged with any crime, not simply crimes that would disqualify firearm possession.

Payseno argues that the Legislature simply intended the "currently charged" language is to ensure that Payseno is not convicted of a disqualifying offense. There is no authority for the proposition that this is what the legislature intended. A more likely explanation is that the Legislature wanted to find out if the petitioner would be found guilty or

not guilty prior to considering restoration.

Indeed, if the Legislature were only concerned about disqualifying offenses, the statutory structure could have required only five years without a disqualifying offense. Instead, it required five years of crime-free behavior, regardless of whether the crime was a disqualifying offense or not. Any criminal conviction should thus start the five-year clock over again. It seems highly unlikely that the Legislature would suddenly have been concerned only about disqualifying offenses when it included the "currently charged" language. It would be inconsistent with the rest of the statute for the legislature to add this language merely because they wanted to see if a petitioner was ultimately convicted of a disqualifying offense.

Payseno also claims that this court should give particular weight to the incorporation of the washout rules set forth in RCW 9.94A.525. He argues that because washout can occur after a crime free period that occurs at any time, the same principle should be applied to firearms.

First, inclusion of the wash out language merely allows petitioners with multiple, old felony convictions to have their rights restored. It also makes defendants convicted of more serious crimes wait a longer period of time before petitioning. Essentially, any offender score other than zero precludes restoration of firearms rights.

Secondly, the minimum washout period for a Class-C felony is

five years. RCW 9.94A.525(2)(c). Thus inclusion of the term "felony" in the phrase "any felony, gross misdemeanor, or misdemeanor crimes" would thus be redundant if it were limited only to felonies that had not washed out. This is contrary to accepted principles of statutory construction:

> Another well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). "'[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.'" *In re Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (*quoting Greenwood v. Dep't of Motor Vehicles*, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). "[W]e may not delete language from an unambiguous statute: '"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."'" *State v. JP*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (*quoting Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (*quoting Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))).

State v. Roggenkamp, 153 Wash.2d 614, 624, 106 P.3d 196 (2005). Clearly the legislative intent was that the petitioner *both* have a zero offender score *and* have been crime-free for the preceding five years. The trial court did not err.

IV. CONCLUSION

For the foregoing reasons, the disposition below should be affirmed.

DATED April 9, 2014.

Respectfully submitted,
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